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No. 775

In the Supreme Court of the United States

OCTOBER TERM, 1941

WILMINGTON TRUST COMPANY, EXECUTOR OF ALICE DU PONT ORTIZ, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 604) is reported in 42 B. T. A. 173. The opinion of the Circuit Court of Appeals (R. 649) is reported in 124 F. (2d) 156.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 3, 1941 (R. 656). The petition for a writ of certiorari was filed on November 29, 1941, and granted on January 12, 1942,

limited to question 1 (a) in the petition (R. 659). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Under the terms of the order of this Court allowing certiorari (R. 659), the question presented is whether the court below should have set aside certain findings of the Board of Tax Appeals relating to whether the sales in the taxpayer's short account were in fact short sales. We believe, however, for reasons fully set forth in the Argument, that no factual issue is actually involved in this case because the undisputed evidence shows precisely how the sales in taxpayer's short account were made. The only question raised by the record with reference to the sales in the short account, therefore, is the issue of law whether or not they should be regarded, for tax purposes, as sales of taxpayer's long stock.

STATEMENT

Petitioner's decedent, referred to herein as the taxpayer,[1] maintained several brokerage accounts with the firm of Laird & Co., in Wilmington, Dela-

[1] The tax returns here involved were filed on the cash receipts and disbursements basis (R. 17). They were joint returns for the taxpayer and her husband. The husband had allowable deductions in excess of his gross income for 1934 and no income or deductions for 1935 and, consequently, he is not involved in this litigation (R. 606).

ware (R. 606).[2] These accounts were designated the "regular", the "special", and the "short" accounts (*id.*).[3] For purposes of convenience, we shall follow the terminology used in petitioner's brief (p. 3) by referring to the "regular" and "special" accounts as the "long accounts" and to the "short" account as such.

During the year 1934, the taxpayer's long accounts were credited with dividends on certain stock in the aggregate amount of $146,017.35. During the same year, the short account was charged with dividends on the same stock issues in the aggregate amount of $145,658.60 (R. 608–609).[4] During the year 1935, the taxpayer's long accounts were credited with dividends aggregating $23,922.50; during the same year, her short account was charged with

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[2] Prior to October 1, 1932, when Laird & Co. was organized, the accounts were carried with the firm of Laird, Bissell & Meeds (R. 606).

[3] The taxpayer also maintained a "trading" account. This account was charged with at least one dividend and credited with a number of others (Ex. L, R. 256, *et seq.*), but, since these dividends do not enter into the computation of the deficiency (R. 21–23, 42, 49), we do not refer to the "trading" account as one of petitioner's "long" accounts.

[4] The amount of dividends charged to the short account differed from the amount of dividends credited to the long accounts on the same stock issues by reason of the fact that the taxpayer's long position in Phillips Petroleum and Equitable Office Building stock exceeded her short position in those stocks. In addition to the $145,658.60 charged to the short account on stock issues also held in the long accounts, taxpayer's short account was charged $300 for dividends on General Motors and California Packing stock not held in the long accounts (R. 609).

dividends on the same stock issues in the aggregate amount of $23,535.00 (R. 609).[5]

Laird & Co. reported the dividends credited to the taxpayer's long accounts as dividends received on stock owned by the taxpayer (R. 610). The taxpayer, in her income tax returns for the years 1934 and 1935, however, did not include these dividends as income (R. 611) on the ground that she did not own the stocks in the long accounts on which the dividends had been credited. In taking this position, taxpayer's theory was that the sales of stock made through her short account were not, in fact, short sales, as they appeared on the broker's books and on her own records, but were rather ordinary sales of the stocks held in her long accounts (cf. R. 26 B, schedule E). On this theory the amount of stock which she owned was not the number of shares credited to her in the long accounts, but only the number of shares by which her long position exceeded her short position in each of the stock issues held in both accounts. The Commissioner, however, determined that the sales made through her short account, were, in fact, short sales and not sales of "long" stock, and that the taxpayer was, therefore, taxable on all of the dividends credited to her long accounts (R. 611). He assessed deficiencies accordingly (R. 10–12).

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[5] In addition, the short account was charged with dividends in the aggregate amount of $1,593.75 on General Motors and American Telephone and Telegraph stock not held in the long accounts.

The taxpayer filed a petition for review with the Board of Tax Appeals (R. 2–14). Thereafter a detailed stipulation of facts was filed (R. 16–527) and testimony was taken (R. 533–604) relating to the manner in which the sales made through the short account were executed and the manner in which they were accounted for on the broker's and the taxpayer's books and records. The evidence on this issue is described in detail in the Argument, and no useful purpose would be served by repeating that discussion here. The Board, after making findings on the issue, which are also described in detail in the Argument, concluded that the sales made through the short account were intended to be and were actually executed as ordinary sales of stock held in taxpayer's long accounts and, consequently, that the dividends charged to the taxpayer's short account should be offset against the dividends credited to her long accounts—in other words, that the taxpayer should be treated as the owner of only that number of shares by which her long position exceeded her short position (R. 614–617).

The court below reversed the decision of the Board, holding that the sales made through the short account were actually short sales (R. 650–651, 656). In reaching this conclusion it set aside certain of the findings of the Board as being unsupported by the record (R. 650). This Court granted certiorari upon petitioner's application for a writ, limited to the question whether the court below

should have set aside the findings of the Board relating to whether the sales in the short account were in fact short sales (R. 659).

SUMMARY OF ARGUMENT

1. The stipulation agreed to by the parties and the testimony of the witnesses called by petitioner show, without any contradiction, precisely how taxpayer's long and short accounts were handled and precisely how the sales made in the short account were ordered, executed, and recorded. Consequently, the Board of Tax Appeals was not called upon to decide any issues of fact upon conflicting evidence; rather, the question before the Board, as also before the court below, was whether the transactions revealed by all of the evidence in the record constituted, in fact and in law, a short or long sale.

Since the record discloses without contradiction all of the evidentiary facts upon which decision must be based, the evidentiary findings of the Board are of little significance in the case; in any event, those findings are, for the most part, undisputed. Controversy is centered on those few findings which the court below set aside as unsupported and which relate primarily to the question whether the taxpayer's long stock was "delivered" in consummation of the sales in the short account. Those findings are to a certain extent ambiguous. They may be intended as statements of fact, in which event they inaccurately describe

the manner in which the sales were executed, as established by all of the evidence in the record. They may, on the other hand, be intended only to express the Board's view of the legal effect of the transactions of sale, in which event, although they are not in contradiction of the evidence, they are not binding upon the courts.

Whichever view of the findings be adopted, we believe it plain that the court below did not err in setting them aside. All of the relevant facts being established without contradiction by the record, the court below was justified in disregarding purported findings inconsistent with those facts and in resolving the issue of law raised by the record.

This conclusion disposes of the only question with respect to which certiorari was allowed. But it does not dispose of the ultimate question of tax liability under the established facts. Consequently, in the thought that the Court, despite the limited terms of the order allowing certiorari, may desire to decide the question of tax liability, we also discuss that issue.

2. The transactions involved in this case are in all substantial respects similar to those involved in *Henry B. DuPont* v. *Commissioner*, 98 F. (2d) 459 (C. C. A. 3), certiorari denied, 305 U. S. 631, and in *Henry F. DuPont* v. *Commissioner*, 110 F. (2d) 641 (C. C. A. 3), certiorari denied, 311 U. S. 657, in which the court below concluded that the Commissioner had properly treated sales, in a

short account as short sales, despite the existence of a parallel long account. This conclusion we believe to be entirely correct.

The maintenance of parallel long and short accounts was designed to give the taxpayer certain tax advantages which she could not have enjoyed had she sold her long stock outright; it served no other purpose whatever. Taxpayer recorded gain or loss on her books on the assumption that the sales in the short account were short sales and not sales of her long stock and she reported her income on that basis for tax purposes. On the books of Laird & Co., too, the sales were recorded as short and not long sales and were so reported for income tax purposes. Since the taxpayer deliberately chose this form for conducting her security transactions, the Commissioner, under the rule of *Higgins* v. *Smith*, 308 U. S. 473, was entirely justified in requiring her to "accept the tax disadvantages" along with the tax benefits of the arrangement.

ARGUMENT

I

THE COURT BELOW PROPERLY SET ASIDE CERTAIN FINDINGS OF THE BOARD OF TAX APPEALS

1. The ultimate question before this Court for decision is whether the Commissioner properly determined that the taxpayer was taxable on the full amount of the dividends which were credited to her on her long accounts, without any offset by reason

of the dividends charged to her on her short account. Petitioner takes the position that the taxpayer was not taxable on the full amount of the dividends credited to her on her long accounts because she did not own all of the shares of stock with which she was credited on those accounts. Rather, petitioner contends, taxpayer owned only that number of shares of stock by which her long position exceeded her short position and, therefore, she may be taxed only with respect to dividends on that number of shares. The contention is based upon the premise that the sales made by the taxpayer through her short account, which were recorded on her books and the broker's books as short sales, were not in fact short sales at all but were rather ordinary sales of taxpayer's long stock.

The Commissioner contends, on the other hand, that the sales made through the short account were not sales of the taxpayer's long stock, and that, in any event, since the taxpayer treated those sales as short sales for accounting and tax purposes, she may not be heard to assert now that they were not short sales. In this view the taxpayer was, of course, properly treated as owner of all the shares of stock held in her long accounts and was accordingly taxable on the full amount of the dividends credited to her with respect to those shares.[6]

[6] If the Commissioner's position is correct the dividends charged to the taxpayer on her short account would be part of the cost of the short sale to be accounted for for tax purposes when the short transaction is completed by a covering purchase or transfer.

The critical issue in the case, therefore, is whether the sales made through the short account are, despite the taxpayer's and broker's books, to be regarded as sales of her long stock. The Board of Tax Appeals held that they were to be regarded as long sales, but the court below held, in accordance with its previous decisions in *Henry B. DuPont* v. *Commissioner,* 98 F. (2d) 459 (C. C. A. 3), certiorari denied, 305 U. S. 631, and *Henry F. DuPont* v. *Commissioner,* 110 F. (2d) 641 (C. C. A. 3), certiorari denied, 311 U. S. 657, that the Commissioner had properly treated them as short sales.

Although the court below, in reaching its conclusion, set aside certain findings of the Board as unsupported (R. 650), it is evident that the divergence in the results reached by the Board and the court is attributable, not to a difference in viewpoint with respect to the operative facts, but to a difference of viewpoint with respect to the legal significance of those facts. For the stipulation agreed to by the parties and the testimony of the witnesses called by petitioner show, without any contradiction, precisely how taxpayer's long and short accounts were handled and precisely how the sales made in the short account were ordered, executed, and recorded. The Board was not called upon, therefore, to decide any issues of fact upon conflicting evidence; rather, the question before the Board, as also before the court below, was whether the transactions revealed by all of the evidence in

the record constituted, in fact and in law, a short or long sale.

Since the record discloses without contradiction all of the evidentiary facts upon which decision must be based, the evidentiary findings of the Board are of little significance in the case; in any event, those findings are, for the most part, undisputed. Controversy is centered on those few findings which the court below set aside as unsupported and which relate primarily to the question whether the taxpayer's long stock was "delivered" in consummation of the sales in the short account. Those findings, as we show below, are to a certain extent ambiguous. They may be intended as statements of fact, in which event they inaccurately describe the manner in which the sales were executed, as established by all of the evidence in the record. They may, on the other hand, be intended only to express the Board's view of the legal effect of the transactions of sale, in which event, although they are not in contradiction of the evidence, they are not binding upon the courts.

In order that this Court may be able properly to evaluate the controverted findings in the light of the record upon which they purport to be based, we describe first the manner in which the taxpayer's accounts were handled as established by all of the evidence in the record and by the Board's own subsidiary findings, and then examine the controverted findings and the testimony said to support them.

2. The taxpayer's long and short accounts were originally set up in 1929 by one R. W. Ellis, an experienced broker and a partner in Laird & Co., who handled business affairs not only for the taxpayer, but also for other members of the DuPont family (R. 579–580, 590, 612).[7] Ellis operated the accounts from 1929 until his death in March, 1933, buying and selling for the accounts both with and without specific instructions from the taxpayer (R. 18, 579–580, 590–591, 612). After Ellis' death, George Weymouth, another partner in Laird & Co., and Russell Jones, an employee of the firm, who was also employed as taxpayer's secretary, handled the accounts, in conjunction with the taxpayer herself (R. 581, 594, 612). Ellis or Weymouth usually determined the account through which any particular transaction was handled (R. 612).

The securities comprising the taxpayer's long accounts consisted of shares of stock which were held by the brokers in the form of certificates in street names (R. 21, 541, 608). These certificates were handled by Laird & Co., together with, and in precisely the same manner as, certificates of stock of other customers similarly held (R. 541–542). None of the certificates held by or for the account of Laird & Co. was in any way designated as belonging to the taxpayer (R. 21, 541–542, 608).

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[7] See *Henry F. DuPont* v. *Commissioner*, 110 F. (2d) 641 (C. C. A. 3), certiorari denied, 311 U. S. 657.

Sales made through the taxpayer's short account, which are the only sales with which we are here concerned, were made in one of two ways, depending upon whether or not the taxpayer's long position in the particular stock to be sold exceeded her short position in that stock. If her long position did exceed her short position, the order to sell was transmitted by Laird & Co. by telephone to its New York correspondent broker with instructions to make the sale "in the regular way" on the floor of the New York Stock Exchange (R. 21, 608). A sale made "in the regular way" is a sale for delivery on the next full business day following the contract (*id.*). Delivery was made to the purchasing broker by Laird & Co. through its New York correspondent with certificates of stock in street names held by the New York correspondent for the account of Laird & Co. (*id.*). After making such delivery, the New York correspondent credited the account of Laird & Co. with the proceeds of the sale of the stock and reduced the number of shares of the particular stock held in street names for Laird & Co. by the number of shares sold (*id.*). Laird & Co. thereupon increased the taxpayer's short account by the number of shares sold and credited that account with the proceeds of the sale (R. 21, 536, 608). It allowed her interest on the amount of her credit balance in the short account and did not charge her with any federal short sale tax (R. 536–537, 547, 548, 608).

Since the taxpayer's long position at that point equaled or exceeded her short position in the particular stock, Laird & Co. did not require the taxpayer to put up any margin (R. 534–536, 539, 610). Its authority for treating taxpayer's long stock as margin for the sales in the short account was the following letter signed by the taxpayer on October 18, 1932 (Ex. 1, R. 604; R. 535–536, 539):

> Please take notice that my accounts designated as follows: Alice duPont Ortiz, Regular; Alice duPont Ortiz, Short; Alice duPont Ortiz, Special; Alice duPont Ortiz, Trading, are one and the same and are merely kept separate for my convenience. All of said accounts belong entirely to me and no one else has any interest therein.

If, at the time of the sale made through the short account, taxpayer's long position did not exceed her short position, the sale was executed in a somewhat different manner.[8] In this event, Laird & Co. charged the petitioner the regular marginal requirement for a short sale, borrowed the stock

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[8] The only sales made through the short account at times when the taxpayer's long position did not exceed her short position in the stock sold were the following:

August 27, 1934	125 shares of Bethlehem (R. 239).
September 20, 1934	100 shares A. T. & S. F. (R. 240).
October 2, 1934	100 shares Chrysler & 100 shares Union Carb. & Carb. (R. 241).
April 17, 1935	100 shares duPont (R. 247).
April 26, 1935	200 shares Equitable Office Bldg. (R. 247).
November 19, 1935	50 shares duPont (254).
November 21, 1935	25 shares duPont (R. 254).

for the purpose of delivery and charged the taxpayer with the federal short sale tax (R. 538, 548, 555, 610). Although the proceeds of the sale were credited to taxpayer's short account, this was a so-called "fictitious credit" upon which no interest was paid, since Laird & Co. retained the actual cash received from the sale for the protection of the purchaser or the broker from whom the stock was borrowed (R. 538, 565, 610).

None of the sales made through the short account was in any way reflected in any of the taxpayer's long accounts; the only book entries made were in the short account itself (see Exs. I, J, and K, R. 123–255). However, none of the sales tickets for sales made through the short account bore the words "short sale" and none of them contained any direction not to deliver taxpayer's long stock (R. 534, 616).

Taxpayer's short position in the short account was covered either by subsequent covering purchases in the short account or by a subsequent transfer of stock from one of her long accounts to her short account, or by a combination of both, (Ex. K, R. 208–255). The taxpayer never recorded gain or loss on her own books at the time she made a sale in the short account, but she did record profit or loss when a covering purchase was made or when stock was transferred from one of the long accounts to the short account (Exs. O, P, R. 311–342; see pp. 30–32, *infra*).

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When dividends were declared on stock held in both the long and short accounts, Laird & Co. credited the long accounts with the full amount of the dividends on the shares held in those accounts, and charged the short account the full amount of dividends on the shares which the taxpayer was short (R. 22, 23, 569 *et seq,* 608–609). In reporting to the Treasury Department on Form 1087, Laird & Co. reported the entire amount of dividends credited to the taxpayer's long accounts during 1934 and 1935 as dividends received on stocks owned by the taxpayer (R. 23, 569 *et seq.,* 610). However, Laird & Co., of course, actually received in cash, directly or through its correspondents, dividends only on the net amount of shares which it held, and received for the taxpayer dividends in cash only on the number of shares by which her long position exceeded her short position (R. 569 *et. seq.,* 610).

3. The foregoing statement, we believe, accurately sets forth precisely how the short account was operated and how the sales made through the short account were executed and recorded. As we read the stipulation of facts and the testimony, there is no dispute whatever with respect to any of these facts.

Petitioner sets forth in its brief, however, several statements of two of its witnesses which, considered in isolation, may seem to be somewhat contradictory of our recital:

(a) The following testimony of Maxwell, the broker's margin clerk (R. 538):

> Q. And you delivered her stock against these sales?
>
> A. That is correct.[9]

(b) The following testimony of Wingate, the broker's stock clerk (R. 554):

> Q. Then, you delivered her long stock to the purchasing broker through your New York correspondent when the sales were made in the short account.
>
> A. That is the idea.

(c) Testimony of Wingate to the effect that no stock was ever borrowed to cover sales of stock in the short account when the taxpayer's long position exceeded her short position (R. 548, 553, 554, 556, 560–561.

The statements of Maxwell and Wingate with respect to the "delivery" of taxpayer's long stock

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[9] See also Maxwell's testimony at R. 537:

"Q. Now, if you remember, having gone over these accounts, there were 39,356 shares long and 39,356 shares short. Now, you are charging a short tax here where her regular account indicates a long position of 39,356 shares of stock. Why didn't you deliver it from that account?

"A. There was no stock there, as far as the margin was concerned.

"Q. That stock had been delivered previously?

"A. In other words, she had sold all her long stock, as far as the margin was concerned.

"Q. And you had delivered that stock against the sale in the short account in accordance with her contract with you?

"A. Absolutely."

when a short sale was made were explained by them upon cross-examination. Maxwell testified as follows on cross-examination (R. 541–542):

Q. The stock held in the long accounts, do you know how that was carried? I believe it is stipulated that it is carried in street names.

A. In street names; absolutely.

Q. When stock is sold and carried it is not kept separate as to the particular customer the stock was received from, is it?

A. No, sir.

Q. It is mingled with other stocks?

A. Yes, sir.

Q. And that was true in this case, was it not, that the stock of Mrs. Ortiz was delivered to you and put in street names and was not held separately for her account?

A. No. It was held in a total position of all our customers at that time.

Q. Can you tell from this Exhibit K, which is the short account, where the stock that is being sold here was secured from?

A. Yes. That came out of our total position with our correspondent. In other words, we took that number of shares out of the total position and delivered it.

Q. And some of that stock so used in making delivery here may or may not have been the stock that was owned by Mrs. Ortiz?

A. We would take it to be her stock.

Q. Is there any way of telling how much of it was hers and how much was somebody else's?

A. Yes. Whatever her net long position was at the time, we can say that was how many shares of duPont stock she had at that time.

Q. Well, you may have considered it as such, but do you have any way of telling, since all the stock that you had of any particular kind is in street names? Do you have any way of telling whose stock is being used to cover the short sale?

A. No, sir.

Similarly, Wingate testified as follows on cross-examination (R. 559):

Q. Now, when stock is held short there is no way of telling whose particular stock is being borrowed to complete that transaction, is there?

A. No. If we borrow from a broker we just get so many shares from the broker in street names. We don't know whose stock it is.

Q. And the same is true if you use your own stock there is no way of telling whose stock it is?

A. Not when it is in street names, no. We only know we have so many shares of stock in the box that we can loan.

As explained by the witnesses in the cross-examination we have quoted, their testimony on direct that taxpayer's long stock was "delivered" pursuant to the sales made in the short account, means, not that there was actual delivery to the purchasing broker of particular certificates belonging to

the taxpayer, but rather that, when the taxpayer's long position exceeded her short position, Laird & Co. was enabled to make delivery out of certificates in street names held by it or for its account, instead of borrowing from other brokers, and that such delivery, for margin purposes and for purposes of the net stock position of Laird & Co., was treated as a delivery of the taxpayer's long stock. No other construction of the testimony squares with the stipulated facts that where the taxpayer's long position exceeded her short position, delivery was made to the purchasing broker with street certificates held for Laird & Co. by its New York correspondent, and that none of the street certificates held by and for the account of Laird & Co. was in any way designated as belonging to the taxpayer. At most, therefore, the testimony relied upon by petitioner simply expresses the witnesses' conclusion as to the legal effect of the transactions of sale, the actual mechanics of which are disclosed by the record. But since the actual details of the transactions are disclosed, the question of whether or not they are to be considered for tax purposes as a sale or delivery of the taxpayer's long stock is, of course, one for decision by the courts, unembarrassed by any statements of legal conclusion by the witnesses.

Wingate's testimony that no stock was ever borrowed *to cover* the sales made through the taxpayer's short account when her long position exceeded her short position is of the same nature as

his testimony that the taxpayer's own stock was delivered to cover the sales. For he stated on cross-examination that whenever a customer gives an order to "sell short," "we look to the long account, and if there is stock in the long account we make delivery out of it" and do not borrow stock from an outside broker to complete the transaction (R. 560–561). He further testified that such a sale is entered in the short account as a short sale and is treated as such for purposes of bookkeeping, charging dividends, and the like (R. 561). In view of this testimony, it is plain that what Wingate meant by his statement that no stock was borrowed to cover short sales when the taxpayer's long position exceeded her short position was that no stock was borrowed from an outside broker, the transaction rather being completed, as the stipulation of facts recites, by delivery of certificates in street names held by and for the account of Laird & Co. Whether such delivery of street certificates constituted, so far as the taxpayer is concerned, a borrowing of stock from Laird & Co. or from other customers of Laird & Co. is, of course, a question of law. Wingate's testimony that there was no borrowing cannot affect determination of that question of law, even if the testimony be construed, as we believe it obviously should not be, as an expression of opinion on that issue.

There is one more portion of the testimony which, although petitioner properly does not rely upon it in its brief, should be discussed because, on its face,

it may appear inconsistent with our statement that the uncontradicted evidence shows that sales made through the short account were not reflected by a reduction of shares in taxpayer's long accounts. Maxwell, the margin clerk, stated on cross-examination (R. 539–540):

> Q. Well, the short account does not show delivery, does it, at the time these sales were made?
>
> A. Yes, it shows delivery. The stock sold in the short account would immediately reduce the position in the long account for the same number of shares.
>
> Q. Well, just how did you reduce that position in so far as the accounts were concerned?
>
> A. Well, on margin. For example, if there are a certain number of shares in the long position and 200 shares are sold in the short account, the short position would be raised by 200 shares and the long position would be reduced by 200 shares, keeping a net balance position.
>
> Q. Well, what sort of record do you keep of that?
>
> A. Just a marginal record, more or less a card form. Of course, the bookkeeping record would be the same thing.

It will be noted that this testimony is only to the effect that the stock sold in the short account would immediately reduce the position in the long account for the same number of shares "on margin". The witness testified that he kept a card form or "mar-

ginal record," on which the sales for the short account were immediately reflected in a reduction of shares held in the long accounts. But the "marginal record" was not offered in evidence and at most it can be taken as showing that, *for margin purposes,* sales made through the short account effected an immediate reduction in the shares held in the long account. Given any broader scope, the quoted testimony of Maxwell would have to be disregarded as in square conflict with the stipulation of facts, which reserves the right to either party to introduce only such evidence as is not inconsistent with the stipulation (R. 17). Attached to the stipulation as Exhibits I, J, and K are photostat copies of the Laird & Co. ledger sheets covering taxpayer's long and short accounts, which show conclusively that the sales made through the short account were not reflected in the long accounts, either by a reduction in the number of shares credited to the taxpayer in those accounts or in any other way. The only times the transactions in the short account affected the long accounts were on those occasions when the taxpayer decided to cover her short position by a transfer of stock from one of her long accounts to her short account (see pp. 30–31, *infra*).

4. The foregoing discussion shows, we believe, that there is no conflict of evidence in the record and that the testimony and stipulation of facts establish without dispute all of the operative facts which are material to decision. There remains,

however, the question of whether the particular findings of the Board which were set aside by the court below are consistent with the facts thus established. These findings purport to be based on the evidence of Maxwell and Wingate which we have quoted. We believe it plain, however, that, if they are intended to be statements of evidentiary fact rather than of mere legal inference, they find support neither in that testimony nor in any of the other evidence in the record.

The primary finding to which we take exception is that "Laird & Co., in all cases where the petitioner held in her long accounts shares in excess of those being sold through the short account * * * made delivery out of the long accounts against the sale made through the short account" (R. 609–610). This finding is again repeated in the Board's opinion where the Board states that the testimony establishes that "delivery from the long account was made at the time of the sale" (R. 616). If these statements are intended as findings of fact that certificates belonging to the taxpayer and identified as hers were delivered in consummation of the sale in the short account, they find no support whatever in the record. As we have shown, the stipulation and testimony conclusively establish that delivery was made with certificates in street names held for the account of Laird & Co. by its New York correspondent, and that none of the certificates held by or for the account of Laird & Co. was in any

way designated as belonging to the taxpayer. Indeed, the Board specifically recognized this fact when it stated in its opinion that "the shares so delivered were not identifiable by certificates as shares belonging to the taxpayer" (R. 615–616).

The Board's findings with respect to "delivery" are not in contradiction of the evidence, however, if they are viewed simply as expressing the Board's conclusion that the delivery of certificates of stock in street names by the New York correspondent of Laird & Co. must be regarded, as a matter of law, as a delivery of the taxpayer's long stock. Indeed, this interpretation of the Board's findings receives considerable support from the statement in the opinion that "the deliveries were *in effect* deliveries from the petitioner's long accounts" (R. 616; italics supplied). Of course, if the Board's findings with respect to "delivery" are to be construed simply as conclusions of law, they are entitled to no greater weight than any other rulings of law by the Board.

Somewhat similar considerations are applicable to the Board's finding that "At the time of the sale the delivery of the shares was recorded on the short account and the position in the long accounts was reduced by the number of shares sold" (R. 610). If the Board meant by this simply that, since the sales in the short account constituted, as a matter of law, sales of long stock, taxpayer's long position was necessarily reduced by the number of shares

sold, the statement is not contrary to the evidence. But if the Board meant that sales in the short account were recorded in the long accounts by a reduction in taxpayer's long position, then the finding is directly contrary to the ledger sheets themselves, which demonstrate, as we have stated, that the sales made through the short account were not reflected in the long accounts in any way.

A further finding of the Board which we believe to be misleading, if not inaccurate, is the statement that, although the street certificates delivered were not identifiable as belonging to the taxpayer, "they necessarily included shares held by the brokers for the petitioner" (R. 616). This finding is true in the sense that all of the certificates of stock held by Laird & Co. in street names for its various customers (except those held for safe keeping, R. 558), were lumped together in Laird & Co.'s "box", so that any delivery of street certificates charged against the box necessarily included shares held by Laird & Co. for all of its customers. But if the finding is intended to connote anything more than this, it is without support in the record. As we have stated, the fact is established that delivery was made with certificates in street names held for Laird & Co. by its New York correspondent, which were in no way designated as belonging to the taxpayer; this fact is, of course, totally contrary to any finding that some of the certificates could be identified as belonging to the taxpayer.

One other statement of the Board merits discussion, namely the sentence in its opinion to the effect that the "witnesses further testified that in every case where the long position exceeded the short position the broker did not borrow any stock from other brokers or other customers for the purpose of delivery" (R. 616). If this statement is meant simply as a finding that delivery was made with certificates in street names held for the account of Laird & Co., it is entirely consistent with the evidence in the record. But if it is intended as a finding that delivery, so made, does not constitute a borrowing of shares from Laird & Co. or from its other customers, it is simply a conclusion of law and is consequently not binding upon the reviewing courts.

5. The foregoing analysis establishes, we submit, that the court below did not err in setting aside the Board's findings. All of the relevant facts being established without contradiction by the record, the court below was justified in disregarding purported findings inconsistent with those facts and in resolving the issue of law raised by the record.

This conclusion, if accepted by this Court, disposes of the only question with respect to which certiorari was allowed—namely, whether the court below erred in setting aside the Board's findings. But it does not, of course, dispose of the ultimate question of tax liability under the established facts. Consequently, in the thought that the Court, despite

the limited terms of the order allowing certiorari, may desire to decide the question of tax liability, we discuss that question in the succeeding section of the brief.

II

THE COMMISSIONER PROPERLY DETERMINED THAT, FOR TAX PURPOSES, THE SALES IN THE SHORT ACCOUNT SHOULD NOT BE TREATED AS SALES OF THE TAXPAYER'S LONG STOCK

1. The transactions involved in this case are in all substantial respects similar to those involved in *Henry B. DuPont v. Commissioner,* 98 F. (2d) 459 (C. C. A. 3), certiorari denied, 305 U. S. 631, and in *Henry F. DuPont* v. *Commissioner,* 110 F. (2d) 641 (C. C. A. 3), certiorari denied, 311 U. S. 657, in which the court below concluded that the Commissioner had properly treated sales in a short account as short sales, despite the existence of a parallel long account. See also *Richardson* v. *Helvering,* 121 F. (2d) 1 (C. C. A. 2), certiorari denied, November 10, 1941, No. 692, this Term. This conclusion we believe to be entirely correct.

Approach to the question is clarified by an understanding of the reasons for the creation of parallel long and short accounts. From an economic standpoint, of course, it makes no difference to an owner of stock whether he sells his stock outright or whether he borrows shares of the same stock from a broker and makes a short sale; in either event, the measure of his wealth is the value

of the stock originally owned, less the value of the stock sold, plus the proceeds of the sale. But from a tax standpoint there is a great deal of difference between the two types of transactions. If the stock is sold outright, the taxpayer realizes profit or loss at the time of sale which he must report in his return for that year. If, however, the long stock is retained and a short sale is made of borrowed stock, realization of profit or loss is postponed until the short sale is covered. See Treasury Regulations 86, Article 117–6. Since the taxpayer can, of course, cover the short sale with his long stock, he is enabled to take advantage of the trend of the market subsequent to the sale and to close the transaction at the time most propitious for him from a tax standpoint. Prior to June, 1932, he was also enabled to use the "capital gain" rate if he covered the short sale with stock which he held for more than two years. In 1932, however, the Revenue Act was amended so as to treat gains and losses from short sales as ordinary gains and losses.

The manner in which the taxpayer handled her accounts and recorded her sales was designed to permit her to take advantage of these tax factors; it served no other purpose whatever. By reason of making sales through her short account rather than through her long accounts, she succeeded in 1934, for example, in maintaining a long position of 39,356 shares of duPont stock, 6,650 shares of McKeesport Tin Plate stock and 5,000 shares of

Phillips Petroleum stock, even though at the same time she was short 39,356 shares of duPont, 6,650 shares of McKeesport and 4,800 shares of Phillips Petroleum (R. 609). Had she intended her sales in the short account to be sales of her long stock, her books would have shown only that she owned 200 shares of Phillips Petroleum. But by making the sales as short sales rather than as ordinary sales of long stock, she kept ownership of her long stock and was enabled to cover the short sales in such manner—i. e., either by covering purchases or by transfers from her long account—and at such times as seemed most desirable from a tax standpoint.

And for tax purposes, taxpayer treated the sales in the short account as short sales rather than as sales of her long stock. If the sales had been sales of long stock, profit or loss would have been realized at the time of sale; if, on the other hand, they were short sales, profit or loss would be realized only at the time that covering purchases or transfers were made. It is significant, therefore, that taxpayer recorded profit or loss, not when the sales were made, but when the covering transactions occurred. Thus, on October 2, 1934, as of September 10, 1934, taxpayer covered 6,650 shares of McKeesport by transferring that amount from her long account (R. 193) to her short account (R. 241). In her personal account entitled "Loss on Stocks and Bonds" she recorded a loss of $74,996.80 (R. 336, fifth line). Similarly, on October 29, 1934, the tax-

payer covered 4,800 shares of Phillips Petroleum by transferring that amount from her long account (R. 151) to her short account (R. 241). In her personal account she recorded a loss of $37,591.20 (R. 337, second line).

Of particular interest is the taxpayer's transfer, on February 25, 1935, of 34,256 shares of duPont from her long account (R. 155) to her short account (R. 245). In her personal account entitled "Profit on Stocks and Bonds" she recorded a gain on the transaction of $192,941.88 (R. 323, eleventh line). The Revenue Agent's report for the year 1935 shows that Mr. William Hennessy, taxpayer's representative, claimed a loss on this transaction and was allowed the loss to the extent of the statutory limit (R. 48). The only way in which the loss could have been allowed was by adding to the cost basis of her 34,256 shares of duPont stock the dividends charged to the short account with respect to that stock during 1932, 1933, and 1934. Exhibits H and K show that these dividend charges amounted to more than $192,941.88, the amount of gain shown on the taxpayer's records.

Taxpayer treated covering purchases in the same manner as covering transfers. For example, during January, 1933, taxpayer bought 1,200 shares of duPont stock in her short account at a total cost of $47,117.50 (R. 216). In her profit and loss accounts for the same month, she recorded profit and loss on the sale of 1,200 shares of duPont stock,

with a total cost basis of $47,117.50. Thus, on January 23, 1932, she recorded the sale of 400 shares of duPont, with a cost basis of $15,822.50, at a profit of $185.30 (R. 316); on January 24 she recorded the sale of 300 shares of duPont, with a cost basis of $11,832.50, at a profit of $304.60 (*id.*); on January 18, she recorded the sale of 400 shares of duPont, with a cost basis of $15,497.50, at a loss of $14.70 (R. 332); and on January 28, she recorded the sale of 100 shares of duPont, with a cost basis of $3,965, at a loss of $106.80 (*id.*). Of course, the recording of profit and loss on the sale of 1,200 shares of duPont stock with a cost basis of $47,117.50 during a month in which the taxpayer purchased in her short account that number of shares of duPont stock at that cost, shows that the purchases in the short account were treated as covering purchases—in other words, that the stock purchased was treated as covering stock previously sold short, the transactions of sale being completed for tax purposes when the covering transactions were made. This treatment of the stock purchased as a covering transaction for purposes of determining gain or loss is, of course, entirely inconsistent with the petitioner's present position that the sales in the short account were in reality sales of taxpayer's long stock.

Not only did the taxpayer treat the sales as short sales, but the brokers who handled her accounts for her, and who generally determined through which account a particular transaction

should be made (R. 612), also treated them as short sales. The customer's ledger sheets which the brokers made out (Exs. I, J and K), and which constituted an account stated between Laird & Co. and the taxpayer,[10] admit of no other conclusion. Had the brokers intended the sales to be sales of long stock and executed them as such, they could not in 1934, for example, have recorded the taxpayer as owner of 39,356 shares of duPont stock and 6,650 shares of McKeesport Tin Plate stock when, at the same time, she was short the same number of shares (R. 609). Furthermore, they could not have credited her with the full amount of the dividends on the stock held for her in her long accounts or reported to the Treasury that these dividends had been received by them as dividends on stock owned by the taxpayer (see p. 16, *supra*).

Nor may these book entries be explained away as mere irregularities of accounting with which the Commissioner is not concerned, for it was by virtue of these book entries that the taxpayer was enabled to postpone completion of the short sales, and consequent realization of gain or loss, until she chose to cover her short position. The customer's ledger sheets establish that, as between the taxpayer and the brokers, she was considered long the number of

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[10] See, e. g., *Mahony* v. *Boenning*, 335 Pa. 210, 214; *Britton* v. *Scognamillo*, 238 N. Y. 375; *Murphy* v. *Second Russian Ins. Co.*, 208 N. Y. App. Div. 144 (1st Dept.) Williston *Contracts* (rev. ed.), Vol. 6, §§ 1862A, 1863.

shares credited to her long accounts and short the number of shares charged to her on her short account. Until a covering transfer authorized by the taxpayer occurred, therefore, the taxpayer had the option, which she frequently exercised, of purchasing shares on the market to cover her short position instead of using her long stock for that purpose. The very existence of this option negates the conclusion that the sales in the short account were sales of the taxpayer's long stock.

2. Our position on this aspect of the case derives considerable support from the decision of this Court in *Higgins* v. *Smith*, 308 U. S. 473. There the Court stated (p. 477):

> * * * A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages.
>
> On the other hand, the Government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham *may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute.* * * * [Italics supplied.]

See also *Gray* v. *Powell*, No. 18, present Term, decided December 15, 1941, where the Court held, in

reliance upon *Higgins* v. *Smith*, that "The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan."

Under the rule thus enunciated, since the taxpayer chose to make the sales through her short rather than through her long accounts, recorded gain or loss on her books on the assumption that the sales were short sales and not long sales, and reported her income on that basis for tax purposes, it seems entirely clear that the Commissioner was justified in requiring the taxpayer to "accept the tax disadvantages" of the form in which she cast her transactions.

3. The facts upon which petitioner relies in its brief do not alter this conclusion. Some of these facts do show, as we have conceded, that from an economic standpoint there is no real distinction of substance between the type of short sale made by the taxpayer and a sale of her long stock, but they are in no way inconsistent with our position that the particular sales here involved were ordered, executed and recorded as short sales and that the Commissioner was therefore entitled to treat them as such.

(a) Petitioner points out, first, that the sales were executed on the New York Stock Exchange "in the regular way" and that delivery to the purchasers was made with certificates in street names (Br. 14). But certainly the fact that the sales

were made for delivery the next full business day, and that delivery was then made with street certificates, is of no probative force in showing that the stock sold was the taxpayer's long stock. The important fact is that none of those street certificates was in any way designated as belonging to the petitioner (R. 21, 608). Indeed, the stipulation recites that all of the sales in the short account were made on the floor of the New York Stock Exchange in the regular way (R. 21), yet petitioner concedes that some of those sales—i. e., sales of stock when the taxpayer's long position did not exceed her short position—were short sales (Br. 13, n. 9).

(b) Petitioner also relies on the fact that no stock was borrowed from an outside broker to complete the particular sales with which we are concerned (Br. 12–13). But Laird & Co., of course, did not have to borrow stock from any other broker when the taxpayer's long position exceeded her short position. The very fact that Laird & Co. held more stock for the taxpayer's long accounts than it had sold for her short account meant that it had to its credit with its New York correspondent sufficient shares of that particular stock with which to make delivery. It does not follow, however, that the certificates delivered to complete the sales in the short account belonged to the taxpayer. To the contrary, so far as the New York correspondent was concerned, all of the securities which it held for

the account of Laird & Co. in street names (other than those which it may have held in safe keeping for particular customers) had to be accounted for to Laird & Co. and to Laird & Co. alone. The decisive issue, therefore, is not the manner in which, as between Laird & Co. and its New York correspondent, the certificates were obtained with which delivery was made, but rather whether, as between Laird & Co. and the taxpayer, the certificates delivered are to be considered as stock owned by the taxpayer or as stock borrowed by the taxpayer from Laird & Co. or its other customers. And on that issue, the account stated between Laird & Co. and the taxpayer, showing short rather than long sales, is, we believe, conclusive.

(c) Similar considerations apply to the facts, also relied upon by petitioner (Br. 14, 16–17), that Laird & Co. did not require the taxpayer to put up any margin, that it credited the proceeds of the sales to her short account, and that it credited her with interest on those proceeds. Since the stock was borrowed by the taxpayer, not from an outside broker, but from Laird & Co. itself or from its other customers, Laird & Co. had no need to require any margin other than the long stock which it held for the taxpayer and which was at all times sufficient to cover the taxpayer's short position. Indeed, as petitioner's witness Maxwell testified, the purpose of the letter signed by the taxpayer on October 18, 1932, stating that her long and short account "are

one and the same" (see p. 14, *supra*) was to enable Laird & Co. to treat the taxpayer's long stock as margin for her short position. Maxwell testified as follows on this point (R. 539):

> Q. Mr. Maxwell, when a customer with a brokerage firm has a number of accounts, is it customary to require separate margins for each account, or are they as a rule considered as one account for margin purposes?
>
> A. They are considered as one account for margin purposes. That is the purpose of that letter.
>
> Q. Well, that is true in any case, is it not?
>
> A. Yes, sir.

The fact that taxpayer's long stock constituted the margin for her short sales also explains why Laird & Co. was enabled to credit the proceeds of the short sales to the taxpayer's short account and to credit her with interest on those proceeds. Where stock is borrowed from an outside broker, the proceeds are held by the seller's broker for the protection of the purchaser or the broker from whom the stock is borrowed and accordingly the seller is not credited with interest thereon (R. 538, 565, 610). But since Laird & Co. did not have to borrow shares from an outside broker and held as margin sufficient of taxpayer's long stock to cover her short position at all times, there was no occasion to withhold the proceeds of the short sales from the taxpayer. Consequently, the fact that it credited her with these proceeds and with inter-

est thereon cannot be said to be inconsistent with the Commissioner's determination that taxpayer's long stock had not been sold.

(d) Petitioner also refers to the fact that Laird & Co. did not charge the taxpayer for the federal short sale tax with respect to sales made when the taxpayer's long position exceeded her short position (Br. 15–16). But plainly the fact that Laird & Co. may have believed, as a matter of law, that the transactions which it executed for the taxpayer did not come within the terms of the short sale tax provisions does not establish that the stock which it sold was taxpayer's long stock. In this connection, it is interesting to contrast Laird & Co.'s action with respect to the short sale tax with its action in reporting to the Treasury Department on Form 1087 the entire amount of the dividends credited to the taxpayer's long accounts during 1934 and 1935 as dividends received on stocks owned by the taxpayer (see p. 16, *supra*). It should be noted, too, that in the case of *Henry F. DuPont* v. *Commissioner, supra,* no federal short sale tax was paid and yet the sale was held to be a short sale.

(e) The finding of the Board (R. 616), quoted in petitioner's brief (p. 8), that none of the sales orders were labeled as short sales is obviously immaterial. However the sales tickets may have been made out, the established fact is that the sales were ordered executed, and were in fact executed,

through the taxpayer's short account and in the manner we have described. The particular form of sales ticket used by Laird & Co. to indicate this type of sale is manifestly irrelevant to the question of the legal effect of such a sale. It is significant that petitioner introduced no evidence whatever to show that a different form of sales ticket was used for the sales with which we are concerned than was used for those sales made through the short account which petitioner admits were short sales (Br. 13, n. 9).

(f) Finally, petitioner relies on the fact that when the firm of Laird & Co. was organized in 1932 as successor to the firm of Laird, Bissell & Meeds (the brokers who had theretofore handled the taxpayer's long and short accounts), Laird, Bissell & Meeds did not transfer to Laird & Co. the total number of shares appearing in taxpayer's long accounts but only that number of shares which represented the difference between the taxpayer's long and short positions. This fact is manifestly without significance. As between Laird, Bissell & Meeds and Laird & Co., the only thing of importance was the net number of shares held for any particular customer—or indeed, for all of the customers—whose accounts were being transferred. At the time of the transfer, for example, taxpayer was long 37,000 shares and short 9,100 shares of duPont stock (R. 21). Had Laird, Bissell & Meeds transferred the entire 37,000 shares of duPont to Laird

& Co., the latter would immediately have had to transfer 9,100 shares of the same stock back to Laird, Bissell & Meeds. Instead of following this absurd circuitous procedure, the two firms of course settled their accounts on a net basis. But this transaction obviously has no bearing whatever on the actual position of the taxpayer as against either firm of brokers.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
RICHARD H. DEMUTH,
MORTON K. ROTHSCHILD,
Special Assistants to the Attorney General.

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SUPREME COURT OF THE UNITED STATES.

No. 775.—October Term, 1941.

Wilmington Trust Company, Executor of Alice duPont Ortiz, Deceased, Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 27, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

The sole question presented by this case is whether certain sales of shares of stock made by the taxpayer, petitioner's decedent, were "short" sales or sales of "long" stock. If they were not "short" sales, then the taxpayer was justified in deducting from dividends credited to the "long" shares the amount of dividends charged to the shares sold.

The taxpayer maintained several accounts with a brokerage house—"regular", "special", and "short". The "regular" and "special" accounts were "long" accounts. During the years 1934 and 1935 the taxpayer's "long" accounts were credited with dividends on certain shares. During the same years her "short" account was charged with dividends on shares of the same stock issues. The taxpayer did not include in her income tax returns for 1934 and 1935 the dividends credited to her "long" accounts on the theory that the amount of stock which she owned was not the number of shares credited to her in the "long" accounts but only the number of shares by which her "long" position exceeded her "short" position in each of the stock issues held in the several accounts. The Commissioner assessed deficiencies on the theory that the sales made through the "short" account were in fact "short" sales and that the dividends charged to the "short" account represented additional cost of the shares and could not be offset against the dividends credited to the "long" accounts. Accordingly he ruled that the taxpayer was taxable on all of the dividends cred-

ited to her "long" accounts. On a petition for review the Board of Tax Appeals found that the sales made through the "short" account were sales of shares held in the taxpayer's "long" accounts. It therefore held that the dividends charged to the "short" account should be offset against the dividend credits. 42 B. T. A. 173. The Circuit Court of Appeals reversed. 124 F. 2d 156. We granted the petition for certiorari limited to the question whether the sales in the "short" account were in fact "short" sales, because the action of the Circuit Court of Appeals in setting aside the findings of the Board on that issue was seemingly erroneous under the rule of such cases as *Helvering* v. *Lazarus & Co.*, 308 U. S. 252.

The findings of the Board were substantially as follows: The sales in question were sales of shares of which the taxpayer held an equal or greater number of the same kind in her "long" accounts. In every such instance the broker, acting under authority from the taxpayer to consider all her accounts as a unit, treated the sales through the "short" account as sales of the taxpayer's "long" shares. None of these sales was labeled as a "short" sale. The broker required no margin and charged no "short" sale tax. He credited the "short" account with the proceeds and made an entry therein showing delivery of the shares at the time of the execution of the sales to the purchaser. In no such case did the broker borrow any stock from other brokers or customers. Orders were executed on the stock exchange in the regular way and delivery was made on the next full business day from certificates in street names held by the broker's New York correspondents. Those street certificates included shares held by the broker for the taxpayer, though none of them was specifically designated as belonging to the taxpayer. The taxpayer was allowed interest on the proceeds of sale. Dividends were collected for the taxpayer only on the number of shares by which her "long" position exceeded her "short" position. On the other hand, whenever the taxpayer's "long" accounts contained no shares of the kind sold, the broker executed the sale as a "short" sale, required the customary margin, charged the "short" sale tax, and made delivery from borrowed stock. On the basis of such facts the Board found that "the sales in question were intended to be and were actually executed as ordinary sales, or sales of shares held" in the taxpayer's "long accounts".

In overturning that finding of fact the Circuit Court of Appeals laid great emphasis on the manner in which the transactions were entered on the taxpayer's books. It also noted that gains or losses were not reported at the moment of the sales but only when the covering transaction was completed and that the certificates used in completing the sales were in no way designated as belonging to the taxpayer. And it also stated that it could not be said that the broker did not use borrowed stock to make deliveries on the "short" sales. On that aspect of the case respondent lays primary emphasis. The contention is that the taxpayer's "long" stock was not "delivered" in consummation of the sales in the "short" account, since the broker merely made delivery out of certificates in street names held by it or for its account, instead of borrowing from other brokers, and since none of those street certificates was in any way designated as the taxpayer's. It is urged that the facts being undisputed, the question of whether stock was borrowed to complete the sales was a question of law as respects which the Board did not have the final say.

The true character of the "short" account is a question of fact to be determined in the light of the outward or manifested intention of the taxpayer and the way in which the account was actually managed. The designation of the accounts, the fact that as a matter of bookkeeping sales made through the "short" account apparently were not reflected in the "long" accounts, the method of reporting gains or losses are some evidence to support the conclusion of the court below. But there are numerous other circumstances which look the other way. They are embraced in the several subsidiary findings which the Board made and which we have enumerated. Those findings are supported by substantial evidence and are abundant justification for the Board's ultimate finding that the sales made through the "short" account were ordinary sales. It is the function of the Board, not the Circuit Court of Appeals, to weigh the evidence, to draw inferences from the facts, and to choose between conflicting inferences. The court may not substitute its view of the facts for that of the Board. Where the findings of the Board are supported by substantial evidence they are conclusive. *Helvering* v. *Lazarus & Co., supra; Helvering* v. *Kehoe*, 309 U. S. 277, and cases cited. Under the statute the court may modify or reverse the decision of the Board only if

it is "not in accordance with law". 44 Stat. 110, 26 U. S. C. § 1141(c)(1). In this case the criteria which the board employed in determining whether the sales were "short" sales complied with the legal principles announced in *Provost* v. *United States*, 269 U. S. 443.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.